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No. 04-900

In the Supreme Court of the United States

BP WEST COAST PRODUCTS LLC AND
EXXONMOBIL OIL CORPORATION,
Petitioners,

v.

FEDERAL ENERGY REGULATORY COMMISSION
AND UNITED STATES OF AMERICA
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITIONERS' REPLY BRIEF

ELIZABETH E. ATLEE
BP AMERICA INC.
BP LEGAL WESTERN REGION
6 Centerpointe Drive
Room 549
La Palma, CA 90623

R. GORDON GOOCH
Counsel of Record
TRAVIS & GOOCH
851 North Glebe Road, Suite 1911
Arlington, VA 22203-9998
(703) 351-7520

NOREEN M. TAMA
EXXONMOBIL OIL CORPORATION
3225 Gallows Road
Room 3D-0634
Fairfax, VA 22037

ELISABETH R. MYERS
BLACKWELL SANDERS PEPER MARTIN LLP
1737 H Street, N.W., Suite 300
Washington, D.C. 20006-3901
(202) 378-2307

April 16, 2005

Counsel for Petitioners

Becker Gallagher Legal Publishing, Inc. 800.890.5001

RULE 29.6 STATEMENT

Petitioners submitted their Rule 29.6 corporate disclosure statements with their Petition for Certiorari filed December 30, 2004.

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ARGUMENT

I. SUGGESTION OF LACK OF JURISDICTION TO CONSIDER THE ARGUMENTS PRESENTED BY RESPONDENTS.

Petitioners respectfully suggest lack of Jurisdiction to consider Respondents' legal arguments because the arguments are not reflected in the decision of the Court of Appeals.

II. CORRECTIONS TO RESPONDENTS' STATEMENT

A. The Oil Pipeline Board's Investigation Was Not Vacated, As Alleged by Respondents in the "Question Presented."

The Respondents allege in their "Question Presented" that the FERC had "properly vacated" the Investigation initiated by the Oil Pipeline Board ("OPB"), the Investigation which Petitioners believe prevents any of the public utility's rates from having "grandfathered" status. This is simply not true and is inconsistent with Respondents' later statement in the body of their brief. The Court of Appeals acknowledged that the Investigation was never vacated. *BP West Coast Products*, 374 F.3d at 1278. Respondents eventually acknowledge that the Investigation was not "vacated." Br. in Opp. at 8. Respondents accurately state one page earlier what the Commission in fact did. Br. in Opp. at 7. The Commission vacated only that additional part of the Order that suspended the rates and made them subject to refund. All that this action did was to set the time when "just and reasonable" rates would take effect upon final Commission order: prospectively or retrospectively. The timing of the effectiveness of just and reasonable rates, as ultimately determined by the Commission, is an immaterial point under the Energy Policy Act of 1992 ("EPAct"). The Order of Investigation into whether the existing rates were "just and

reasonable" remains intact, and that is the material fact for implementation of EPAct.

What therefore cannot be escaped is the fact that in the relevant time frame the duly authorized OPB ordered an Investigation under ICA Section 15(7) as to whether *all* of the public utility's rates were "just and reasonable." As Respondents put it, Br. In Opp. at 5, there were only "existing" rates in the tariffs, so the Investigation did apply to existing rates.

B. Under EPAct, An Investigation Alone Prevents "Grandfathering" Of The Public Utility's Rates.

The statute clearly and unequivocably states three factual grounds for denying "grandfather" status to rates in effect for more than one year -- and these grounds *are stated in the alternative*: "protest, investigation *or* complaint." EPAct Section 1803(a)(1) (emphasis added) (Pet. App. 316a).

It suffices that any one of the three enumerated procedures – protest, investigation *or* complaint -- be a fact. Here the fact is that there was an investigation launched to determine whether the existing rates of the public utility were "just and reasonable," and that investigation was launched within one year of date of enactment. It does not matter under EPAct whether there were or were not *also* a complaint and/or a protest, nor what any protests or complaints did or did not allege.

C. Under The Interstate Commerce Act, The Commission (Or Its Delegate, The Oil Pipeline Board) Has Authority To Act On Its Own Initiative To Launch An Investigation.

In the late 1800s, the Congress established an agency to protect shippers and consumers against "unjust and unreasonable rates" and discriminatory service of interstate common carriers. While the statute has been amended from

time to time, such as to include oil pipelines within the Commission's jurisdiction, and more recently to remove railroads from the panoply of the Act's requirements, the same duty still applies to the Commission with respect to oil pipelines. The Commission is not an Article III Court whose jurisdiction must be invoked by some form of complaint and whose scope is limited to issues raised by outsiders. Section 15(7) of the statute in question clearly and unequivocally gives the Commission jurisdiction to act "upon its own initiative." ICA Section 15(7) (Pet. App. 300a). This Court in *Ayrshire Collieries* made clear that the Commission could act on its own initiative. *Ayrshire Collieries*, 335 U.S. at 581-583. This power was duly delegated to the OPB, as Respondents acknowledge. Br. in Opp. at 5.

In this case, the OPB, on its own initiative, launched an Investigation into *all* the rates filed by the public utility in the newly filed tariffs, including all existing rates, as to whether those rates were "just and reasonable." As Respondents recognize, Br. in Opp. at 6, the OPB does not adjudicate; the OPB is, in effect, a grand jury. The case is then referred to an Administrative Law Judge who provides an on-the-record hearing and issues a decision which may be appealed to the Commission and then to the Courts. It is this subsequent hearing process, under Section 15(1) that leads to the establishment of "just and reasonable" rates. Indeed, Section 15(1) jurisdiction, on its face, is triggered by either a complaint filed or upon an Investigation and hearing launched on Commission's own initiative.

III. REPLYING TO RESPONDENTS' "ARGUMENT": THE COURT OF APPEALS IGNORED *AYRSHIRE COLLIERIES*, BUT RESPONDENTS TENDER A SUBSTITUTE FOR A DECISION.

The predicate, laid above, is as follows: (1) the OPB had the statutory authority pursuant to Section 15(7) delegated to

it to order an Investigation; (2) the OPB, acting on its own initiative, as authorized by Section 15(7), ordered an Investigation into all rates contained in the tariffs, including all existing refiled rates; (3) the Order of Investigation was never vacated. Under EPAct, the fact that this Investigation existed within one year of date of enactment suffices to meet one of the three independent and alternative grounds for denying grandfathered rate status. Therefore, the rates of this public utility are not grandfathered.

According to Respondents, the existing rates would still be grandfathered, because an Investigation pursuant to ICA Section 15(7) cannot reach existing rates. The Court of Appeals so held, ignoring completely the decision of this Court in *Ayrshire Collieries*. However, in the argument in their Brief in Opposition, the Respondents, in effect, claim to state what the Court of Appeals *would have said* about *Ayrshire Collieries*, had the Court of Appeals addressed the case at all.

We now address the Respondents' *Ayrshire Collieries* argument on the jurisdictional scope of Section 15(7).

A. Respondents Mischaracterize *Ayrshire Collieries*: This Court Did Hold That An Investigation Under Section 15(7) Of The ICA Serves To Precipitate A Review Of Both Existing And New Rates In A Newly Filed Tariff.

The OPB, pursuant to its delegated authority, ordered an Investigation (meaning an on-the-record hearing before a Judge) to determine whether all of the public utility's rates were "just and reasonable." The Respondents take the position that the Order of Investigation could not lawfully apply to the existing rates.

That very question was presented to this Honorable Court in *Ayrshire Collieries*. There the carrier challenged the jurisdiction of the Commission to address existing rates along

with new rates when a tariff was filed, citing the fact that Section 15(7) was predicated on a tariff being filed stating a "new" rate, charge or classification and providing for a hearing on "such" rate. The Court held that the Commission could indeed consider existing rates in the proceeding following the Investigation launched under Section 15(7).

As this Court stated the question presented:

> First. It is contended that the Commission in this proceeding had authority to determine the lawfulness only of the proposed rates not of the present rates.

Ayrshire Collieries, 335 U.S. at 581.

Here are the precise answers of the Court that are most salient to Respondents' claims:

- "This proceeding is an investigation and suspension proceeding under s 15(7) of the Interstate Commerce Act." *Id.*
- "The power of the Commission to deal with the situation as if the new rates had become effective is necessarily a comprehensive one. It seems too plain for argument that such broad authority is ample for the modification of either proposed or existing rates or both." *Id.* at 582.

The Court will search Respondents' Brief in Opposition in vain for the quotations above when Respondents "recite" the *Ayrshire Collieries* case. Respondents did not even attempt to "distinguish" this holding.

Additionally, this Court found in *Ayrshire Collieries* that an Investigation was properly launched against a new tariff with only a single pre-existing rate in it, rejecting the claim that the public utility had not received sufficient notice that an issue of existing rates was raised when the new tariff was set for Investigation under 15(7). The Court held that the

launching of the Investigation gave sufficient notice that the existing rate was challenged. The Respondents state that this holding is less than clear, Br. in Opp. at 16, and thus conclude that this Supreme Court case may be ignored. Yet Respondents acknowledge that the Court "did go on to uphold the Commission's authority to bring the refiled existing rate into the proceeding, find it unlawful, and order a new rate for that service." Br. in Opp. at 17.

Respondents seek to "explain away" that result by saying that the Commission's authority to change the rate seemed to the Court to stem from Section 15(1). Of course it did. The Investigation ordered under Section 15(7) operates to invoke the jurisdiction of the Commission to change rates pursuant to Section 15(1). Br. in Opp. at 17. By analogy, Section 15(7) is the basis for the "indictment" and Section 15(1) is the basis for the "trial," conducted first by a Judge, then reviewed by the Commission. The Investigation Order does not adjudicate anything; it only precipitates the adjudication. Respondents acknowledge that the existing rates were brought into the adjudication by the Investigation order.

Section 15(1) provides authority to the Commission to change "any" rate *after* an Investigation and hearing ordered by the Commission on its own initiative. Section 15(7) is one way the Commission may order an investigation and hearing on its own initiative; thus, Section 15(1) follows from Section 15(7).

Respondents also seek to cast doubt on the Court's holding in *Ayrshire Collieries* on the ground that some other procedures were also pending. Br. in Opp. at 14. This point is not material. The Court's holding was directed to ICA Section 15(7).

No amount of obfuscation can avoid the plain reading of the Court's decision. It is clear that *Ayrshire Collieries* does apply here, and both the Court of Appeals and the

Commission were bound to follow it.

The Order of Investigation issued by the OPB did apply to existing rates, and therefore the public utility's rates are not grandfathered.

B. The Court Of Appeals Having Ignored *Ayrshire Collieries*, Respondents Seek To Supply The Decision That The Court Of Appeals Would Have Made, Had The Court Of Appeals Made A Decision.

The Court of Appeals did not address *Ayrshire Collieries* at all, although called upon to do so both originally in brief, on oral argument, and on petition for rehearing. Completely ignoring *Ayrshire Collieries*, the Court below held that existing rates were immune from challenge under ICA Section 15(7), as if this were a case of first impression in the 21st century under a statute whose provenance is in the 19th century.

Here the Respondents attempt to supply the holding that Respondents believe the Court of Appeals would have made with respect to the applicability of *Ayrshire Collieries*, had the Court of Appeals addressed the issue. We believe that this effort rises to a due process level, depriving petitioners of fundamental rights, among them being the right to judicial review of agency action by a duly constituted Article III Court. The Court of Appeals had the duty to consider relevant precedent concerning the point raised on appeal and the duty to apply the law as determined by this Court, but failed to do so. The Solicitor General's view may not substitute for that right, especially as the Solicitor General is the advocate for the Commission here.

Further, the Court of Appeals ignored the fact that the decision of the FERC was fatally, internally inconsistent.

- On the one hand, the Commission held that the Commission lacked jurisdiction even to launch an

Investigation into the existing rates pursuant to Section 15(7) when a new tariff was filed. Opinion No. 435, 86 FERC ¶ 61,022, at 61,063 (Pet. App. 110a). This decision the Court reviewed, ignoring *Ayrshire Collieries*.

- On the other hand, the Commission held that it is the duty of the public utility to justify both *existing and new rates upon the filing of a new tariff*. Opinion No. 435, 86 FERC ¶ 61,022, at 61,117 (Pet. App. 230a). This was also ignored by the Court of Appeals.

Both decisions cannot be correct; they are mutually exclusive. Consequently, there is not even a rational FERC decision that can be reviewed. We believe the Commission correctly stated the law, now in its third century, when it stated that the public utility has the duty to justify both existing and new rates upon the filing of a new tariff.

Thus, all the Court has before it for review is the argument made by Respondents on the applicability of the controlling precedent in *Ayrshire Collieries*, effectively stripping the Commission of its basic jurisdiction and duty -- at the Commission's insistence. With all due respect to the Solicitor General of the United States, he is not an Article III Court empowered to substitute for the Court of Appeals. This point is even more important since it is the Commission itself which seeks to evade its duty under the statute.

IV. RESPONDENTS DID NOT CONTEST THE PUBLIC INTEREST CONSIDERATIONS TENDERED BY PETITIONERS.

The Respondents did not contest that shippers and consumers nationwide, dependent on public utilities transporting essential fuels in interstate commerce, will be adversely affected by this case, if the Court of Appeals decision is not reversed. The Commission will have

successfully shifted the burden to ensure that all existing rates in a newly filed tariff are "just and reasonable" onto the shippers and consumers through the complaint process, placing the burden on shippers and consumers to recreate the public utilities' books and challenge the claims of expert witnesses, while the utility sits back on the defense, and the expert Commission staff has no affirmative duty to perform any independent analysis. To illustrate how ineffective the complaint process is, this case started as a protest, or in the alternative, a complaint in 1992. The Commission elected to make it a complaint case, evading its jurisdiction and duty under Section 15(7). That was thirteen years ago, and the first set of complaints, even against rates that were not even claimed to be grandfathered, is still not resolved, and there is no end in sight.

Even more starkly illogical would be the result if the Commission set a hearing to determine only whether new rates were "just and reasonable," leaving existing rates alone. As all public utility "cost of service" rates are set based on the same costs, the same cost allocation doctrines, and the same rate design doctrines, even the new rates, standing alone, cannot be examined on a cost of service basis without also considering the lawfulness of existing rates. If the Respondents prevail, then in a hearing set to determine whether only new rates are unjust and unreasonable, where, for example, the Commission finds that the utility's rate base is unlawfully inflated (*cf. Verizon Communications Inc. v. FCC*, 535 U.S. 467, 486 (2002)), then all of the public utility's rates are undoubtedly unjust and unreasonable. Yet the Commission would, under the Respondents' formulation, be able to adjust only the new rates. *Ayrshire Collieries* prevents this egregious result.

In addition to not contesting that shippers and consumers would be harmed if the Court of Appeals decision on this issue is not reversed, the Respondents did not contest that

significant harm is inflicted on the consumers and shippers in interstate commerce to western states, where this public utility has a monopoly on the transportation of gasoline, diesel, and jet fuel and is overcharging by millions of dollars a year.

Therefore, it is uncontested that the case now before this Honorable Court is of significant public interest. The decision below must be reversed, else the interstate pipelines achieve a *de facto* deregulation in contravention of, and without the approval of, Congress. *See, e.g., Maislin Indus., U.S. v. Primary Steel, Inc.*, 497 U.S. 116, 132-135 (1990).

While it may be the view of regulatory agencies such as the FERC that the deregulation (or even partial deregulation) of public utilities which are monopolies or monopsonies will result in "free market forces" substituting for regulation to ensure reasonable rates and non-discriminatory service, this is not the view of the shippers and consumers, nor of the Congress. Deregulate a monopoly and you get a monopoly. This Court made this point clear in *FPC v. Texaco*, 417 U.S. 380, 399-401 (1974).

CONCLUSION

Therefore, granting of the petition for writ of certiorari and reversal of the decision below is respectfully urged.

Respectfully submitted,

ELIZABETH E. ATLEE
BP AMERICA INC.
BP LEGAL WESTERN REGION
6 Centerpointe Drive
Room 549
La Palma, CA 90623

NOREEN M. TAMA
EXXONMOBIL OIL
CORPORATION
3225 Gallows Road
Room 3D-0634
Fairfax, VA 22037

R. GORDON GOOCH
Counsel of Record
TRAVIS & GOOCH
851 North Glebe Road
Suite 1911
Arlington, VA 22203-9998
(703) 351-7520

ELISABETH R. MYERS
BLACKWELL SANDERS
PEPER MARTIN LLP
1737 H Street, N.W.
Suite 300
Washington, D.C. 20006
(202) 378-2307

Counsel for Petitioners

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